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IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-1026

FLOYD A. VAHALIK, PETITIONER

VS.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

RIP COLLINS
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A Professional Corporation
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COUNSEL OF RECORD
FOR PETITIONER

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Floyd A. Vahalik, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on November 7, 1979.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 606 F.2d 99 and is printed in Appendix A hereto, infra, page 24. The Journal Entry of Judgment of the United States District Court for the Western District of Texas, Jack Roberts, Judge, is printed in Appendix A hereto, infra, page 27.

JUDGMENT

The judgment of the United States Court of Appeals for the Fifth Circuit (Appendix A, infra, page 24) was entered on November 7, 1979. A timely petition for rehearing was denied on December 3, 1979 (Appendix A, infra, page 24. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether law enforcement officials may seize a citizen's garbage which has been placed out for collection on the citizen's front yard, when a city ordinance prohibits any person other than authorized garbage collectors from interfering in any way with such garbage.

2. Whether the double jeopardy clause requires that the date of the offense alleged in the indictment must be proved at trial, or whether

the prosecution need only prove any date of offense within the month before the indictment.

3. Whether testimony from another hearing or testimony concerning exhibits never tendered or admitted into evidence may be used to prove a defendant's identity at trial.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States, which provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This case involves the Fifth Amendment to the Constitution of the United States, which provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Milita, when in actual service in time of War or public danger; nor shall any

> person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

This case involves Section 28-3 of the Municipal Code of the City of Austin, Texas, which provides as follows with respect to garbage receptacles:

> No person shall remove the cover to any such receptacle, except when depositing or removing the contents, nor in any manner interfere with the receptacle or contents thereof, except those authorized for such a duty.

STATEMENT OF THE CASE

This is an appeal from a federal criminal prosecution, in which Petitioner, Floyd A. Vahalik, was convicted of possession with intent to distribute a Schedule II Controlled Substance, methamphetamine, in violation of 21 U.S.C. § 841(a)(1).

THE EVIDENCE

On September 25, 1978, Kay Vahalik picked up a case of phenyl-2-propanone from a motor freight

company in Waco, Texas, and then drove and brought those chemicals to her residence at 5702 Glen Meadow, Austin, Texas. Rec. Vol. 2, p. 11. The pickup of the phenyl-2-propanone in Waco, Texas, was under the observations of Government agents. Rec. Vol. 2, p. 11. Kay Vahalik was followed by the agents from Waco, Texas, to the Austin address and her residence in Austin was then put under twenty-four-hour-a-day surveillance. Rec. Vol. 2, pp. 14-15. On September 27, 1978, at approximately 6:00 a.m., a detective from the Waco Police Department and one of the Government agents picked up the trash bags that they had allegedly seen Mr. Floyd Vahalik place on the front lawn of 5702 Glen Meadow, at approximately 4:30 a.m. and 5:40 a.m. Rec. Vol. 2, pp. 15, 17, 30.

On that same day, a search warrant was issued on the basis of Kay Vahalik's purchase and pickup of the phenyl-2-propanone and items found in the trash bags containing traces of methamphetamine. Pursuant to this search warrant, Drug Enforcement Administration agents searched the residence at 5702 Glen Meadow Drive, Austin, Texas, an unspecified number of days later. Rec. Vol. 2, pp. 61-62. The agents found approximately two pounds of methamphetamine and various amounts of barbituric acid derivative and methaqualone. Rec. Vol. 2, pp. 63-64; Vol. 4, pp. 48-50, 58, 77-81. Petitioner and his wife were then arrested. R. Vol. 2, p. 69.

On October 26, 1978, a federal grand jury returned an indictment alleging that on or about September 27, 1978, Floyd A. Vahalik and Dorothy K. Vahalik unlawfully, knowingly, and intentionally did possess with intent to distribute methamphetamine. Rec. Vol. 1, p. 1.

At trial, the Government first introduced a number of photographic slides taken from the seized trash bags and the subsequent search of the home at 5702 Glen Meadow in Austin. Several slides contained likenesses of Petitioner (GX 12, 16), but these were never introduced into evidence. The Government never contended that it could prove at what location the slides were made, and stipulated during trial that the slides were "merely showing that there are pictures, and then there are things that looks (sic) like those pictures that were seized." Rec. Vol. 4, p. 34. The only slides actually introduced into evidence were three found in the seized trash bags. GX 2, Rec. Vol. 4, p. 9. No person was pictured in the three slides constituting Government Exhibit 2. Rec. Vol. 4, pp. 3-9. At trial, the arresting officer identified as "the defendant, Mr. Floyd Vahalik" a man pictured in several of the slides. R. Vol. 4, pp. 13, 26, 36, 37, 42, 46. However,

none of these slides were even tendered into evidence. No other mention of Petitioner's name was made at trial, nor was he identified from the witness stand.

THE RULINGS BELOW

The district court overruled Petitioner's Motion To Suppress Evidence on February 5, 1979. Rec. Vol. 2, p. 84. Petitioner's Motion For A Directed Verdict Of Not Guilty for failure to prove up the indictment was also overruled without written opinion by the district court on the same date. Rec. Vol. 4, p. 98. Petitioner was then found guilty of possession with intent to distribute methamphetamine, and on March 23, 1979, Petitioner was sentenced to serve a term of three (3) years confinement, and a special parole term of two (2) years, to begin after the expiration of the confinement. Rec. Vol. 4, p. 98; Rec. Vol. 3, p. 3.

The Court of Appeals affirmed the judgment of the district court in all respects. The Court of Appeals held the identification of Petitioner as the man pictured in several photographic slides never tendered into evidence, along with identification testimony presented at the hearing on the Motion To Suppress, was sufficient to prove the Petitioner's identity at trial. 606 F.2d at 100.

The Court also held that proof of discovery of methamphetamine and a crate of chemicals in Petitioner's possession at any time within a one month period before the indictment adequately demonstrated the date of the offense, irregardless of the date charged in the indictment. Id. Finally, the Court of Appeals held that Petitioner had no reasonable expectation of privacy with respect to his garbage once he placed it out for collection. 606 F.2d at 101. The Court further held that absent any affirmative showing of knowledge or reliance by Petitioner, no expectation of privacy in such a situation arises under a city ordinance prohibiting anyone other than authorized garbage collectors from such inference. Id.

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted To Decide An Important Question Of Constitutional Law Which Has Not Been Settled. By This Court, That Of Garbage Searches And The Limited Objective Expectation Of Privacy Incident Thereto.

All evidence introduced at trial by the Government was obtained from either the warrantless seizure of trash bags owned by Petitioner or a search of his home made pursuant to a search

warrant. The only direct proof of the presence of methamphetamine in the affidavit in support of the warrant in the latter instance was obtained through the warrantless seizure of the above-mentioned trash bags. Thus, the central question in the admissibility of nearly every Government Exhibit was the propriety of the warrantless seizure of the trash.

One of the Government agents making the seizure conceded that the bags were taken while still situated on Petitioner's front lawn. Rec. Vol. 2, pp. 16-17. The trash had thus not been co-mingled with other person's garbage or undergone any other indicia of a relinquishment of Petitioner's control and expectation of privacy. United States v. Minker, 312 F.2d 632 (3rd Cir. 1962); Magda v. Benson, 536 F.2d 211 (6th Cir. 1976). Rather, the undisputed evidence at trial shows that the trash bags were seized directly from the front lawn of Petitioner's private residence, only twenty minutes after he had placed them there. Rec. Vol. 2, p. 17.

Primary guidance on this issue is to be found in the Supreme Court decision of Katz v. United States, 389 U.S. 347 (1967), in which the "reasonable expectation of privacy" of citizens was established as the critical inquiry in such cases. Katz represented a departure from past law in its

recognition that "the Fourth Amendment protects people, not places," and thus turned judicial inquiries away from static geographical tests to more individual examination, focusing on the Fourth Amendment rights of the citizen, rather than his home. A significant aspect of this Court's decision in Katz is the statement that what a citizen "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. 389 U.S. at 351.

Therefore, the key inquiry in this instance becomes whether petitioner's expectation of privacy was reasonable. Petitioner testified that the trash bags were placed on the grass in his front lawn, next to his mail box. Rec. Vol. 2, p. 75. He further stated that this was an area which he had always maintained. Id. at 76. Thus, the distinguishing factor of commonly owned land often cited in other garbage search cases is not present. Magda v. Benson, supra. Nor did the Government agents obgain Petitioner's consent to seize the trash bags. Rec. Vol. 2, pp. 32-33.

Significant direct evidence of the expectation of privacy in this case is found in the City Code of the City of Austin, Texas. Petitioner introduced into evidence Section 28-3 of the Code. Rec. Vol. 2, pp. 36, 83. Section 28-3 provides that, with respect to garbage:

> No person shall remove the cover to any such receptacle, except when depositing or removing the contents, nor in any manner interfere with the receptacle or contents thereof, except those authorized for such a duty.

Rec. Vol. 2, p. 34.

The government agent making the seizure testified that he did not have the authorization required by the ordinance. Id., p. 36. The agent further testified that the bags were closed at the top, thus precluding any "plain view" exception to the warrant requirement. Id; Chimel v. California, 395 U.S. 752 (1969).

Section 28-3 of the Austin City Code is significant in that it represents a local, community determination of what the "reasonable" expectation of privacy is with respect to one's garbage placed for collection. The "except for those authorized" language is a reaffirmance of petitioner's position at trial that one's expectation is that only authorized refuse collectors may interfere with such items. Surely no one can seriously contend that by placing garbage bags out for collection a person tacitly consents to the opening and perusal of such items by anyone wishing to do so. Affirmance in this case would mean that Government agents can ignore validly enacted local ordinances, as well as search and seizure

items not in plain view from the front lawn of a citizen's residence.

Other courts have recognized the dangers of such a holding. In People v. Edwards, 458 P.2d 713 (Calif. 1969), and People v. Kridva, 486 P.2d 1262 (Calif. 1973), the California Supreme Court found that by an objective standard, the doctrine of abandonment was not sufficient to destroy a citizen's reasonable expectation that trash set out on one's own property for pick-up by municipal trash collectors would not be rummaged through without some determination of reasonable cause. Any opposite holding would mean that law enforcement officials could collect trash from an entire subdivision of homes, pore through it, and then use the contents as the sole basis for criminal prosecution of any person residing in the area.

This result can only be avoided by an adoption of the analysis used above in Kridva and Edwards. As one federal court has explained, all prior decisions upholding warrantless searches of refuse found that "the necessary subjective expectation of privacy was lacking," without asking "whether a limited objective expectation of privacy might exist." United States v. Choate, 422 F.Supp. 261, 269 (D.C. Calif. 1976).

The Court of Appeals declined comment on the "limited objective expectation of privacy" issue,

as has every Court of Appeals which has considered the issue of garbage searches. Petitioner's testimony regarding his expectations, failure to give consent, and upkeep of the area, as well as the Austin ordinance, have adequately raised this issue, and certiorari should be granted to delineate the standards for this objective expectation of privacy.

The Court of Appeals did address the issue of the effect of the Austin ordinance, stating that the City of Austin ordinance expressly prohibiting such seizures is inapplicable to this case:

> . . . because there is no indication in the record that appellant relied upon the ordinance to increase his expectation of privacy, or that he was even aware of the ordinance.

606 F.2d at 101.

Placing this burden on a defendant is totally contrary to all decisions concerning a citizen's state of mind with regard to legislative enactments.

Regarding knowledge, it is the universal rule that everyone is presumed to know the law and bound to take notice of it. Meacham v. Halley, 103 F.2d 967 (5th Cir. 1939), cert. den. 60 S.Ct. 86. This is a conclusive presumption. Pettibone v. Cook County, Minnesota, 120 F.2d 850 (8th Cir. 1941). Therefore, it matters not if no evidence

was presented on petitioner's knowledge of the ordinance. The law conclusively presumes that such knowledge is present for all laws. Were the rule otherwise, our criminal justice system would soon become unworkable.

The same presumption must inescapably apply to reliance, the other factor cited by the Court. 606 F.2d at 101. Petitioner has been unable to locate any decision holding that a defendant must prove he "relied" on the Fourth Amendment in order to suppress tainted evidence, or that a victim must have "relied" on a penal statute during the committing of an offense by another in order to seek aid from the prosecutor's office. All of our laws, be they federal, state, or local, are designed to inure to the benefit of all citizens, unless they specifically provide otherwise. Just as a bank need not prove that it relied on a Uniform Commercial Code statute while preparing a note that is later sued upon, petitioner cannot be required to do the impossible and prove that he consciously relied on an ordinance every time he placed his garbage out for collection.

The effect of the Court of Appeals' holding is to nullify a validly enacted, constitutional local ordinance with respect to law enforcement officials. The "presumed purpose" of the ordinance, referred to by the ordinance, referred to by

the Court of Appeals in support of its holding without citation, is irrelevant, for the ordinance speaks in clear and absolute terms, requiring no supplemental aids in interpretation and providing no exceptions.

II.

Certiorari Should Be Granted To Exercise This Court's Power Of Supervision Over The Lower Courts' Departure From Former Jeopardy Safeguards.

The indictment in this cause alleged:

> That on or about September 27, 1978, in the Western District of Texas, Defendants,
>
> Floyd A. Vahalik
> and
> Dorothy K. Vahalik
>
> unlawfully, knowingly, and intentionally did possess with intent to distribute approximately ten pounds of methamphetamine, a Schedule II Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1).

Rec. Vol. 1, p. 1.

The date September 27, 1978, appears nowhere in the testimony or evidence introduced at trial. In order for a conviction to stand, all elements of the offense must be established at trial. United States v. Seckler, 431 F.2d 642 (5th Cir. 1970). The total failure to prove that the

offense charged occurred on the date recited in the indictment renders the evidence legally insufficient to support the conviction. As a result, the judgment of conviction must be reversed and remanded for a judgment of acquittal. Burks v. United States, 98 S.Ct. 2141 (1978).

The Court of Appeals held that evidence showing that petitioner's wife was observed receiving a crate of chemicals in another city on September 25, 1978, and that this crate was recovered an unspecified number of days later during a search of petitioner's residence was sufficient to prove the date of the offense. 606 F.2d at 100. The Court of Appeals then stated:

> Accordingly, proof of discovery of the methamphetamine and the crate of chemicals in appellant's possession within the month before the indictment adequately demonstrated the date of the offense.

Id.

With this holding, the Court of Appeals has set a troublesome precedent for all future criminal proceedings. First, an indictment will no longer serve to put a defendant on notice as to the charges he will face. Under the above theory expressed by the Court, it makes no difference if the proof at trial shows that the offense was committed an entire month after date alleged in the indictment. Thus, a defendant could be

presented with an indictment citing an offense on November 1, 1979, prepare to rebut that charge at trial, and then be caught surprised and totally unprepared by evidence of conduct on December 1, 1979, at trial. The complete undermining of the rationale behind the constitutional right to an indictment is patently obvious. U. S. Const. Amend. V.

A second danger inherent in the Court of Appeals' holding is the inability of petitioner to offer a plea of former joepardy in any subsequent proceeding. To support a claim of double jeopardy, the defendant must show that the two offenses charged are in law and in fact the same offense. United States v. Robinson, 588 F.2d 1041 (5th Cir. 1979); Dryden v. United States, 403 F.2d 1008 (5th Cir. 1968). If petitioner is indicted on another charge of possession with intent to distribute methamphetamine, he will be foreclosed from asserting a claim of former jeopardy. Since the Court of Appeals has held that the date mentioned in the indictment is not controlling, and no evidence at trial established a definite date on which the possession occurred, petitioner has no way of knowing, much less proving, what date his conviction relates to.

The only authority cited by the Court on this issue is Russell v. United States, 429 F.2d 237,

238 (5th Cir. 1970). 606 F.2d at 100. Russell is not applicable to the present case for two reasons. First, the holding in Russell dealt with an error in the indictment date, and not with a failure to prove the date of the offense at trial. Russell v. United States, supra. Secondly, the double jeopardy problem was not present in Russell, because the record in that case affirmatively showed that the defendant was aware of the erroneous date. Id. Such is clearly not the situation presented to the Court at this time.

Certiorari should be granted to correct this deviation from the safeguards guaranteed in the Former Jeopardy clause, and to reaffirm the requirement that the Government prove at trial what has been alleged in the indictment.

III.

Certiorari Should Be Granted To Halt A Dangerous Trend In The Court Of Appeals Relaxing Standards Of Proof In Criminal Prosecutions.

In the Court of Appeals for the Fifth Circuit, recent years have witnessed a marked erosion in the amount of evidence required to prove the most basic and central of issues in a criminal prosecution, the identity of the defendant. United States v. Maestas, 546 F.2d 1177 (5th Cir. 1977) (identity may be proved by inference and

circumstantial evidence); United States v. Washington, 550 F.2d 320 (5th Cir. 1977) cert. den. 98 S.Ct. 138 (evidence on identity need not be absolutely positive); Delegal v. United States, 329 F.2d 494 (5th Cir. 1964), cert. den. 85 S.Ct. 44 (defendant need not be pointed out from the witness stand).

While this Court has indirectly (through the denial of certiorari) sanctioned some of these past holdings, such cannot be the result in the present case, which represents the most radical departure from accepted standards of proof to date.

Perhaps the most elementary rule in criminal law is that in order for a conviction to occur, all elements of the offense must be established by independent evidence or corroborated admissions of the accused. United States v. Seckler, supra. In this instance, the most basic of these elements, the identity of the accused, was never proved in any manner. While the wife of petitioner was identified during their joint trial, no attempt was made to identify petitioner. Rec. Vol. 4, p. 93.

Furthermore, there is no circumstantial evidence to connect the petitioner with the premises searched in connection with this cause. None of the physical evidence introduced bore the

name of petitioner. Although a number of slides seized during the search of the house pictured petitioner (GX 12, 16), these slides do not serve as a vehicle of proper identification. First, neither Government Exhibit 12 nor 16 was ever admitted into evidence. Furthermore, the Government stipulated during trial that these slides were "merely showing that there are pictures, and then there are things that looks (sic) like those pictures that were seized." Rec. Vol. 4, p. 34. Finally, the Government never contended that it could prove at what location the slides were made. The only slides introduced into evidence were three found in trash bags taken by law enforcement agents. GX 2, Rec. Vol. 4, p. 9. No person was pictured in the three slides constituting Government Exhibit 2. Rec. Vol. 4, pp. 3-9.

Petitioner moved for a directed verdict of not guilty at the closing of the evidence, citing the Government's failure to prove up its indictment. Rec. Vol. 4, p. 97. Said motion was then overruled by the trial judge. Rec. Vol. 4, p. 98. Because the failure to prove petitioner's identity rendered the evidence legally insufficient to convict the appellant, the trial court's judgment must be reversed and remanded for a judgment of acquittal. Burks v. United States, supra.

In rejecting petitioner's point of error regarding the proof of his identity at trial, the Court of Appeals held that:

> Because of his arrest concurrent with the seizure of the methamphetamine at his home and the testimony linking the "defendant, Vahalik" to the photographic likeness shown at the scene of the offense, we hold that there was ample evidence to identify appellant for purposes of this prosecution.

606 F.2d at 100.

The Court of Appeals erred in holding that either of these matters could be considered by the trial court on the issue of identity. First, the statement of the arresting officer, referring to "Mr. Vahalik," was not even made at trial. R. Vol. 2 at 69-70. Rather, this testimony was given at the hearing on petitioner's Motion To Suppress. Id. Because this prior testimony was never even offered into evidence during the actual trial, it cannot under any theory be now considered in an assessment of the sufficiency of the evidence. Even if the prior testimony had been offered at trial, it would have been inadmissible because the issues were not "substantially the same" at the two proceedings. Lyon v. United States, 413 F.2d 186 (5th Cir. 1969). Nor was any showing made that the arresting officer was unavailable to

testify at trial. Fed. R. Evid. 804; United States v. Edwards, 469 F.2d 1362 (5th Cir. 1972).

The other evidence relied upon by the Court was the likenesses in the photographic slides which were never tendered into evidence. 606 F.2d at 100. Evidence on identity of a defendant must be more than testimony of a resemblance. United States v. Lewis, 485 F.2d 236 (5th Cir. 1973), cert. den. 94 S.Ct. 1569. Evidence never tendered to the trial court is not properly a part of the record on appeal. Arnold v. United States, 414 F.2d 1056 (9th Cir. 1969), cert. den. 90 S.Ct. 593. Since these slides were not in evidence and are not a part of the record, the Court of Appeals should not have relied on them in any way in determining the sufficiency of the evidence. There is no way for the Court to know with certainty who or what was depicted in the slides, and therefore the verdict cannot be supported by assumptions as to what the district court viewed and was obligated not to consider.

Certiorari should also be granted in this instance because, in addition to the erosion of the standard of proof created by the Court's decision, the Court of Appeals has in effect created a distinctly different standard of proof for trials held before the court rather than before a jury. Had petitioner's trial occurred

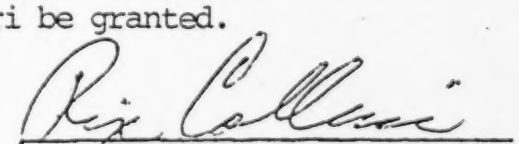
before a jury, it is axiomatic that testimony presented at the Motion To Suppress hearing could not be considered in assessing the sufficiency of the evidence to convict petitioner. Similarly, an appellate court would be barred from considering testimony inextricably linked to the photographic slides which, as the Court of Appeals concedes, were never even tendered into evidence. 606 F.2d at 100.

The Court of Appeals' statement that the district court "could not have avoided comparison of the appellant to the likeness in the slides" finds no support in any presently existing theory or rule regarding materials not in evidence, and is understandably made without citation.

Certiorari should be granted in order to halt this clearly emerging radically different standard of proof for criminal prosecutions tried before the court rather than a jury.

CONCLUSION

WHEREFORE, petitioner respectfully prays that a writ of certiorari be granted.



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APPENDIX A

UNITED STATES v. VAHALIK 949

UNITED STATES of America,
Plaintiff-Appellee,

v.

Floyd A. VAHALIK and Dorothy K. Johnson Vahalik,
Defendants-Appellants.

No. 79-5181,
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Nov. 7, 1979.

Defendant was convicted before the United States District Court for the Western District of Texas, Jack Roberts, J., of possession with intent to distribute methamphetamine, and he appealed. The Court of Appeals held that warrantless seizure of garbage that defendant had placed at curb in front of his home for collection was not violative of Fourth Amendment on asserted ground that defendant had maintained reasonable expectation of privacy in contents of closed bags until contents were intermingled with garbage of others by duly authorized collectors, notwithstanding municipal ordinance prohibiting anyone but authorized collectors from tampering with garbage receptables placed for collection, absent special arrangement for disposition of garbage inviolate and absent indication that defendant had relied upon ordinance to increase his expectation of privacy, or that he was even aware of ordinance.

Affirmed.

1. Criminal Law ⇐339.6

An inference of identification of defendant, in prosecution for possession with intent to distribute methamphetamine, was supported by evidence disclosing defendant's arrest concurrent with seizure of methamphetamine at his home and testimony linking the "defendant * * *" to the photographic likeness shown at scene of offense. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 202(c), Schedule II, 401(a)(1), 21 U.S.C.A. §§ 812(c), Schedule II, 841(a)(1).

2. Drugs and Narcotics ⇐103

Proof of discovery of methamphetamine and crate of chemicals in defendant's possession within the month prior to indictment adequately demonstrated date of offense as alleged in indictment charging possession with intent to distribute methamphetamine. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 202(c), Schedule II, 401(a)(1), 21 U.S.C.A. §§ 812(c), Schedule II, 841(a)(1).

3. Searches and Seizures ⇐7(10)

Warrantless seizure of garbage that defendant had placed at curb in front of his home for collection was not violative of Fourth Amendment on asserted ground that defendant had maintained reasonable expectation of privacy in contents of closed bags until contents were intermingled with garbage of others by duly authorized collectors, notwithstanding municipal ordinance prohibiting anyone but authorized collectors from tampering with garbage receptacles placed for collection, absent special arrangement for disposition of garbage inviolate and absent indication that defendant had relied upon ordinance to increase his ex-

* Fed.R.App.P. 34(a); 5th Cir. R. 18.

Synopses, Syllabi and Key Number Classification
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The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

pectation of privacy, or that he was even aware of ordinance. U.S.C.A.Const. Amend. 4.

Appeal from the United States District Court for the Western District of Texas.

Before GODBOLD, REAVLEY and ANDERSON, Circuit Judges.

PER CURIAM:

Appellant Floyd Vahalik appeals from his non-jury trial at which he, along with his wife, was convicted of possession with intent to distribute a Schedule II Controlled Substance, methamphetamine, in violation of 21 U.S.C. § 841(a)(1). Appellant contends, first, that the government failed to prove his identity and to prove the date of the offense as stated in the indictment. Second, appellant argues that the trial court erred in denying his motion to suppress evidence, and the fruits of that evidence, obtained in a warrantless seizure of garbage that appellant had placed at the curb in front of his home for collection. We affirm the conviction.

The identity of a criminal defendant may be proved by inference and circumstantial evidence. *See United States v. Maestas*, 546 F.2d 1177, 1181 (5 Cir. 1977). The evidence need not be absolutely positive, *United States v. Washington*, 550 F.2d 320, 327–28 (5 Cir.), *cert. denied*, 434 U.S. 841, 98 S.Ct. 138, 54 L.Ed.2d 105 (1977), and defendant need not be pointed out from the witness stand. *Delegal v. United States*, 329 F.2d 494 (5 Cir.) *cert. denied*, 379 U.S. 821, 85 S.Ct. 44, 13 L.Ed.2d 32 (1964).

[1] Sufficient testimony was adduced to support an inference of identification of appellant. The arresting officer stated that "Mr. Vahalik" had been apprehended at a residence determined to be appellant's home (R.Vol. 2 at 69–70); at the time of the arrest two pounds of methamphetamine were seized during a search of this residence. This same officer identified as "the defendant, Mr. Floyd Vahalik" a man pictured in a photographic slide in the garage of the same residence (R.Vol. 4 at 36), and also identified five other photographic slides as depicting the same "Mr. Vahalik" (R.Vol. 4 at 13, 26, 37, 42, 46). While none of these slides were, themselves, properly tendered into evidence, the court as trier of fact heard the testimony in reference to the slides while observing them, and could not have avoided comparison of the appellant to the likeness in the slides that had been identified as "Mr. Vahalik". Because of his arrest concurrent with the seizure of the methamphetamine at his home and the testimony linking the "defendant, Vahalik" to the photographic likeness shown at the scene of the offense, we hold that there was ample evidence to identify appellant for purposes of this prosecution.

[2] Appellant's complaint that the government failed to prove the date of the offense as alleged in the indictment, "on or about September 27, 1978", is similarly without merit. Appellant was indicted on October 26, 1978. Evidence was adduced to show that appellant's co-defendant, his wife, was observed receiving a crate of a chemical constituent of methamphetamine on September 25, 1978. This same crate was recovered shortly thereafter during the search of appellant's residence, along with the two pounds of methamphetamine and its derivatives. "[W]ithin reasonable limits, proof of any date [of an offense] before the return of the indictment and within

the statute of limitations is sufficient." *Russell v. United States*, 429 F.2d 237, 238 (5 Cir. 1970) (quoting 1 C. Wright, Federal Practice and Procedure § 125 at 247 (1969)). Accordingly, proof of discovery of the methamphetamine and the crate of chemicals in appellant's possession within the month before the indictment adequately demonstrated the date of the offense.

[3] Finally, appellant contends that the trial court erred in refusing to suppress evidence seized from his garbage without a warrant and the fruit of that seizure: the search warrant and its harvest. The garbage produced syringes, needles, and other implements that contained traces of methamphetamine; these items, sifted from garbage bags that appellant had placed at the edge of the street for collection, provided the probable cause basis for issuance of the warrant for the subsequent search of appellant's residence. While admitting that the bags seized by the agents had been set out for collection, appellant contends that he maintained a reasonable expectation of privacy in the contents of the closed bags until those contents were intermingled with the garbage of others by duly authorized collectors. In support of his position appellant cites section 28–3 of the Austin Municipal Code, which prohibits anyone but authorized collectors from tampering with garbage receptacles placed for collection.

The rule in California accords with appellant's contentions. *People v. Krivda*, 5 Cal.3d 357, 366, 96 Cal.Rptr. 62, 486 P.2d 1262 (1971), *vacated*, 409 U.S. 33, 93 S.Ct. 32, 34 L.Ed.2d 45 (1972), *reaff'd*, 8 Cal.3d 623, 105 Cal.Rptr. 521, 504 P.2d 457, *cert. denied*, 412 U.S. 919, 93 S.Ct. 2734, 37 L.Ed.2d 145 (1973). *See also, United States v. Choate*, 422 F.Supp. 261, 269 n.16 (C.D.Cal.1976), *rev'd on other grounds*, 576 F.2d 165 (9 Cir.), *cert. denied*, 439 U.S. 953, 99 S.Ct. 350, 58 L.Ed.2d 344 (1978). We prefer the view adopted by every United States Court of Appeals to consider the issue,[1] that the act of placing garbage for collection is an act of abandonment which terminates any fourth amendment protection because, "absent proof that a person has made some special arrangement for the disposition of his garbage inviolate, he has no reasonable expectation of privacy with respect to it once he has placed it for collection." *United States v. Crowell*, 586 F.2d 1020, 1025 (4 Cir. 1978), *cert. denied*, —— U.S. ——, 99 S.Ct. 1500, 59 L.Ed.2d 772 (1979). The municipal ordinance cited by appellant does not alter the application of this rule in the instant case because there is no indication in the record that appellant relied upon the ordinance to increase his expectation of privacy, or that he was even aware of the ordinance. The purpose of the ordinance was, presumably, sanitation and cleanliness, not privacy. *See United States v. Dzialak*, 441 F.2d 212, 215 (2 Cir.), *cert. denied*, 404 U.S. 883, 92 S.Ct. 218, 30 L.Ed.2d 165 (1971) (similar ordinance held not to alter fact that defendant abandoned his garbage).

The judgment of the trial court convicting appellant is AFFIRMED.

1. *United States v. Shelby*, 573 F.2d 971, 973–74 (7 Cir.), *cert. denied*, 439 U.S. 841, 99 S.Ct. 132, 58 L.Ed.2d 139 (1978) (noting that any other rule respecting fourth amendment protection of trash is too unrealistic to be pursued); *Magda v. Benson*, 536 F.2d 111, 112 (6 Cir. 1976) (per curiam); *United States v. Mustone*, 469 F.2d 970, 972 (1 Cir. 1972); *United States v. Dzialak*, 441 F.2d 212, 215 (2 Cir.), *cert. denied*, 404 U.S. 883, 92 S.Ct. 218, 30 L.Ed.2d 165 (1971). *See United States v. Alden*, 576 F.2d 772, 776–77 (8 Cir.), *cert. denied*, 439 U.S. 855, 99 S.Ct. 167, 58 L.Ed.2d 161 (1978); *United States v. Minker*, 312 F.2d 632 (3 Cir. 1962), *cert. denied*, 372 U.S. 953, 83 S.Ct. 952, 9 L.Ed.2d 978 (1963).

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

JUDGMENT OF DISTRICT COURT

Defendant, Floyd A. Vahalik, in the presence of the attorney for the government appeared in person and by his attorney, Rip Collins, on March 23, 1979. Defendant has been convicted as charged of the offense(s) of unlawfully, knowingly, and intentionally possessing with intent to distribute approximately ten pounds of methamphetamine, a Schedule II Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1) as charged in the indictment. The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years. It is further ordered that the defendant serve a special parole term of two (2) years.

PROOF OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Petition For Writ Of Certiorari has been sent certified mail, return receipt requested, to Mr. Wade Hampton McCree, Jr., Solicitor General of the United States, United States Department of Justice, Washington, D.C., 20530, on this the 28th day of December, 1979.

Rip Collins

RIP COLLINS

Supreme Court, U. S.
FILED
JAN 9 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-1026

FLOYD A. VAHALIK, PETITIONER

VS.

UNITED STATES OF AMERICA

SUPPLEMENTAL APPENDIX

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

RIP COLLINS
KUHN, COLLINS & ALEXANDER
A Professional Corporation
507 West Tenth Street
Austin, Texas 78701
512/472-7241

COUNSEL OF RECORD
FOR PETITIONER

IN THE SUPREME COURT

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507 West Tenth Street
Austin, Texas 78701
512/472-7241

COUNSEL OF RECORD
FOR PETITIONER

APPENDIX A

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FLOYD A. VAHALIK,

Defendant-Appellant

No. 79-5181,

Summary Calendar.

United States Court of Appeals,

Fifth Circuit

Nov. 7, 1979.

Before GODBOLD, REAVLEY and ANDERSON, Circuit Judges.

PER CURIAM:

Appellant Floyd Vahalik appeals from his nonjury trial at which he, along with his wife, was convicted of possession with intent to distribute a Schedule II Controlled Substance, methamphetamine, in violation of 21 U.S.C. § 841(a)(1). Appellant contends, first, that the government failed to prove his identity and to prove the date of the offense as stated in the indictment. Second, appellant argues that the

trial court erred in denying his motion to suppress evidence, and the fruits of that evidence, obtained in a warrantless seizure of garbage that appellant had placed at the curb in front of his home for collection. We affirm the conviction.

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(R.Vol. 4 at 13, 26, 37, 42, 46). While none of these slides were, themselves, properly tendered into evidence, the court as trier of fact heard the testimony in reference to the slides while observing them, and could not have avoided comparison of the appellant to the likeness in the slides that had been identified as "Mr. Vahalik". Because of his arrest concurrent with the seizure of the methamphetamine at his home and the testimony linking the "defendant, Vahalik" to the photographic likeness shown at the scene of the offense, we hold that there was ample evidence to identify appellant for purposes of this prosecution.

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statute of limitations is sufficient." Russell v. United States, 429 F.2d 237, 238 (5th Cir. 1970) (quoting 1 C. Wright, Federal Practice and Procedure § 125 at 247 (1969). Accordingly, proof of discovery of the methamphetamine and the crate of chemicals in appellant's possession within the month before the indictment adequately demonstrated the date of the offense.

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privacy, or that he was even aware of the ordinance. The purpose of the ordinance was, presumably, sanitation and cleanliness, not privacy. See United States v. Dzialak, 441 F.2d 212, 215 (2nd Cir.), cert. den., 404 U.S. 883, 92 S.Ct. 218, 30 L.Ed.2d 165 (1971) (similar ordinance held not to alter fact that defendant abandoned his garbage).

The judgment of the trial court convicting appellant is AFFIRMED.

[1] United States v. Shelby, 573 F.2d 971, 973-74 (7th Cir.), cert. den., 439 U.S. 841, 99 S.Ct. 132, 58 L.Ed.2d 139 (1978) (noting that any other rule respecting fourth amendment protection of trash is too unrealistic to be pursued); Magda v. Benson, 536 F.2d 111, 112 (6th Cir. 1976) (per curiam); United States v. Mustone, 469 F.2d 970, 972 (1st Cir. 1972); United States v. Dzialak, 441 F.2d 212, 215 (2nd Cir.), cert. den., 404 U.S. 883, 92 S.Ct. 218, 30 L.Ed.2d 165 (1971). See United States v. Alden, 576 F.2d 772, 776-77 (8th Cir.), cert. den., 439 U.S. 855, 99 S.Ct. 167, 58 L.Ed.2d 161 (1978); United States v. Minker, 312 F.2d 632 (3rd Cir. 1962), cert. den., 372 U.S. 953, 83 S.Ct. 952, 9 L.Ed.2d 978 (1963).

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 79-5181

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

Versus

FLOYD A. VAHALIK and
DOROTHY K. JOHNSON VAHALIK,
Defendants-Appellants

Appeal From The United States
District Court For The
Western District Of Texas

ON PETITION FOR REHEARING

December 3, 1979

Before GODBOLD, REAVLEY and ANDERSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of Floyd A. Vahalik in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

By: Thomas M. Reavley,
United States Circuit Judge

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 79-5181
Summary Calendar

D. C. Docket No. A-78-CR-105

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

Versus

FLOYD A. VAHALIK and
DOROTHY K. JOHNSON VAHALIK,
Defendants-Appellants

Appeal From The United States

District Court For The

Western District Of Texas

Before GODBOLD, REAVLEY and ANDERSON, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION THEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

November 7, 1979.

ISSUED AS MANDATE: Dec. 17, 1979

(AS TO APPELLANT FLOYD A. VAHALIK ONLY)

PROOF OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Supplemental Appendix to Petition For Writ Of Certiorari has been sent certified mail, return receipt requested, to Mr. Wade Hampton McCree, Jr., Solicitor General of the United States, United States Department of Justice, Washington, D.C., 20530, on this the 7th day of January, 1980.

RIP COLLINS